

No. 21,742

IN THE

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

BUTCHER'S UNION LOCAL NO. 120, AMAL-
GAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA,
AFL-CIO,
Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF OF RESPONDENT UNION

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FILED

SEP 18 1967

SEP 8 1967

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PRELIMINARY STATEMENT

This case represents extremely simple questions to be determined by this Court. The General Counsel for the National Labor Relations Board has cited in his brief a myriad of cases but refuses to deal with the basic issues.

We will attempt to treat this matter briefly, as we have throughout these proceedings, on the following

issues as found by the Trial Examiner of the National Labor Relations Board:

“1. Whether the object of the picketing was informational or recognitory;

“2. Whether the petition filed in 20-RM-803 can serve as a defense; and

“3. Whether an appropriate unit existed at Pacheco which would support a petition filed under Section 9(C) of the Act¹ or a direction of election under Section 8(b)(7)(C).”

All issues were fully briefed by the undersigned in the brief to the Trial Examiner which is part of the record in this matter. The Trial Examiner felt, however, that the first two items need not be decided, and with respect to item 3 the filing of a petition by respondent Union would have been a nullity inasmuch as a one-man unit is not an appropriate unit under the standards established by the National Labor Relations Board. These questions will be dealt with below.

**NO DEMAND FOR RECOGNITION OR REPRESENTATION
WAS EVER MADE BY THE UNION.**

The legal position of the Union in this matter at all times has been that there has never been a demand for recognition and there has never been a request to represent the employees of the affected employer

¹The reference here and subsequently in this brief to “the Act” is to the Labor Management Relations Act of 1947, as amended.

within the time periods which are material to this action. Under those circumstances the Union has a right to engage in standards of picketing and to advise the public of its dispute with the employer which arises by virtue of the fact that the employer is paying substandard conditions to its employees. (*NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 790*, 377 US 58 (April 20, 1964); *NLRB v. Servette, Inc.*, 377 US 46 (April 20, 1964).)

It has also been held that informational picketing without an immediate recognition of all objectives will not support an employer's petition for an election where the Union disclaims interest in representing the employees involved, as is the case in the instant matter. (*Martino's Complete Home Furnishings*, 145 NLRB No. 66 (1963); *Cockatoo, Inc.*, 145 NLRB No. 167 (1963).)

It is therefore clear that either under the theory of so-called informational (standards) picketing or consumer picketing, the conduct of the respondent in this matter is lawful and that a disclaimer serves to prevent processing of an unfair labor practice charge against it under the theory proposed by the General Counsel, even if it were conceded for purposes of argument, that a demand had in fact been made for recognition.

The entire position of the General Counsel and the National Labor Relations Board is that the picketing here was without the filing of a petition pursuant to the provisions of Section 9(c) of the Act and was therefore unlawful conduct pursuant to the provisions

of Section 10(1) of the Act. In fact, however, a petition for representation was filed pursuant to the provisions of Section 9(c) in Case No. 20-RM-803, and was attached to the petition for injunction filed in the United States District Court for the Northern District of California in Case No. 44496. Therefore the position of the General Counsel has been inconsistent throughout these proceedings.

It is further clear that the picketing in this case was lawful since the record conclusively establishes that there was no interference with the company's employees, its operations, or deliveries. (See *Claude Everett Construction Co.*, 136 NLRB 321; *Calument Contractors Association*, 133 NLRB 512.)

**THE FILING OF A PETITION BY RESPONDENT IN THIS
MATTER WOULD HAVE BEEN A NULLITY.**

In this regard it should be noted that respondent cannot be required to file a petition where the filing of such a petition would be a nullity. The National Labor Relations Board will not entertain a petition for representation election where the unit consists of a single employee. In this case the so-called employee unit includes, according to the affidavit of Pacheco, three production employees, two of whom are the sons-in-law of the owners, and their two part-time employees, both of whom are the daughters of the employer, who states this is a "family-operated business".

The Act specifically exempts a parent or spouse from the definition of "employee" and the Board treats all relatives of management who enjoy a special status which allies their interest with those of management as exempt employees. (*Teamsters Local Union No. 115*, 157 NLRB 588 (No. 57, Villa-Barr Co.), 61 LRRM 1386; see, also, *International Metal Products Co.*, 107 NLRB 65 (1953).)

It should be noted further that the Trial Examiner agreed with the position of respondent Union in this case and on that basis held that no unfair labor practice was committed.

It is respondent's contention that the Board in reaching its conclusion did not even deal with the issues handled by the Trial Examiner and on that ground it is respectfully submitted that the petition for enforcement should be denied.

Dated, San Francisco, California,
September 7, 1967.

LEVY, DERoy, GEFfNER & VAN BOURG,
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America, AFL-CIO.*

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR J. VAN BOURG,

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